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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 595

ARTHUR SCHOFIELD, ET AL., PETITIONERS

v.

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE, AND NEW ENGLAND MILK PRODUCERS' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court dated October 7, 1955 (Pet. 41–45), and the court's oral statement of October 21, 1955 (Pet. 47–49) have not been reported. The opinion of the Court of Appeals (Pet. 49–56) is reported at 236 F. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1956 (Pet. 57). A timely motion for rehearing in banc was denied on September 11, 1956. The petition for a writ of certiorari was filed on

November 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

An Order of the Secretary of Agriculture under the Agricultural Marketing Agreement Act enlarges the Greater Boston (Milk) Marketing Area so as to include the area for which petitioners produce milk. The questions presented are:

1. Whether, in the absence of the invasion of a legal right, the allegation of an expected financial loss confers standing on petitioners to challenge the validity of the Order.

2. Whether, even assuming *arguendo* that petitioners had standing, the court below erred in holding that petitioners' attack on the Order is without substance.

STATUTE INVOLVED

The pertinent provision of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. 601, *et seq.*, are set forth in the Appendix, *infra*, pp. 21–29.

STATEMENT

1. THE ECONOMIC AND STATUTORY BACKGROUND

The petition in this case seeks to raise issues connected with the regulation of the milk industry. As this Court has stated, such issues are "entwined with factors that call for understanding of the milk industry," [1] the economy of which "is so eccentric that

[1] *United States* v. *Ruzicka*, 329 U. S. 287, 294.

economic controls have been found at once necessary and difficult."[2] The factors which render such regulation imperative have been explained in detail by this Court in *Nebbia* v. *New York*, 291 U. S. 502, 516–518, and *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 549–550, and will be dealt with only briefly here.

Since milk is an essential element of diet, and in particular of young infants, the public interest requires a constant adequate supply of wholesome milk. The demand and supply of milk, however, are subject to sharp variations. Apart from considerable fluctuations in the daily demand of milk, there are seasonal cycles in the supply, as the result of which there is nearly twice as much milk available in June as there is in November. Storage of the excess supply to meet a later peak in demand, however, is not possible in view of the highly perishable nature of milk.[3]

This surplus milk, *i. e.*, the milk which exceeds the current demand for fluid milk as a food beverage, can be utilized in the production of cream, butter, cheese, milk powder, and similar items. For those purposes, however, it can be sold only at a greatly reduced price. Consequently, all producers compete most eagerly for the more profitable fluid milk market. The resulting cut-throat competition readily engenders business

[2] *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525, 529.

[3] Thus, in order to insure satisfaction of the daily demand, the milk industry must carry a surplus of about 20% (*Nebbia* v. *New York*, 291 U. S. 502, 517); a supply sufficient to meet the needs in November necessitates a surplus of more than 50% during the flush season in June.

practices which jeopardize "the quality and in the end the quantity"[4] of the vital fluid milk supply.

The principal problem therefore is to find a method by which the burden of the surplus milk may be borne equitably by the entire industry, *i. e.*, by all the producers and the handlers (distributors) of the milk. One method designed to achieve this end was first developed by cooperatives. Under this plan, the cooperative would sell its members' milk for a variety of uses and at a variety of prices, place the proceeds into a single fund, and pay each member on an equal basis according to the quantity of milk supplied by him, not according to the purposes to which his milk has been used. By this method of "blending" the price, the burden of surplus milk is spread evenly over all the members of the cooperative.[5] The inherent weakness of this system is that an individual dairy farmer who refuses to join the cooperative can profitably escape assuming his share in the surplus milk burden by selling all his milk to a distributor at a price lower than the cooperative's price for fluid milk but higher than the blended price received by the cooperative farmers.

State legislation passed during the depression to give statutory sanction to the blended price method was found to be constitutional in *Nebbia* v. *New York*, 291 U. S. 502. State control of the milk industry, however, had one serious deficiency. Much of the milk consumed in the large metropolitan centers

[4] *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 550.

[5] Cf. *Barns* v. *Dairymen's League Co-op. Ass'n, Inc.*, 220 App. Div. 624, 630.

moves in interstate commerce [6] and the States lack the power to prevent the importation of unregulated milk. *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511.

Congress thereupon entered the field—first under the Agricultural Adjustment Act Amendments of 1935, Section 5 (49 Stat. 753), and now under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), as amended—to deal with the problem, which co-operatives and state regulation had been unable to solve.[7] The regulatory plan of the statute, described and held constitutional in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, authorizes the Secretary of Agriculture to issue Orders designed to effectuate the declared policy of the Act, 7 U. S. C. 608c (1) *infra*, pp. 22–23.[8] Such orders are applicable to handlers,[9] but not to producers in the capacity of pro-

[6] The City of Boston obtains about 90% of its fluid milk from States other than Massachusetts. *H. P. Hood & Sons* v. *DuMond*, 336 U. S. 525, 526. Only 70% of the milk of the New York City metropolitan area originates in New York State. *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 519.

[7] Shortly after the decision in *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, the States of New York, New Jersey, Pensylvania, Maryland, Massachusetts, Vermont, and Connecticut petitioned the Secretary of Agriculture that he exercise his licensing powers under Section 8 (3) of the Agricultural Adjustment Act (48 Stat. 34–35) to regulate milk moving in interstate commerce. See Brief for Appellant, pp. 17–18, in *Noyes* v. *Rock Royal Co-op. Inc.*, Supreme Court of the United States, October Term, 1938, No. 826.

[8] In view of the many amendments of the basic statute, we refer to the text as found in Title 7 of the United States Code. For the pertinent provisions of the Act, see *infra*, pp. 21–29.

[9] "Handlers" as defined in 7 U. S. C. 608c (1) (App., *infra*, pp. 22–23) are processors, associations of producers, and others engaged in the handling of certain agricultural commodities, including milk.

ducers (7 U. S. C. 608c (13), *infra,* pp. 26–27). Among other provisions of the Act, a handler covered by such an order is forbidden from paying less than a minimum price designated in the order, but there is nothing to prevent him from paying more.

A prerequisite to issuance of an order under the Act is a hearing conducted by the Secretary (7 U. S. C. 608c (3), *infra,* p. 23). After the hearing, a majority of the handlers affected may sign a marketing agreement concerning that commodity (7 U. S. C. 608c (8), *infra,* p. 24). If they fail to do so, the Secretary may issue an order if the two following conditions, set forth in 7 U. S. C. 608c (9) (*infra,* pp. 24–26) are met. First, the proposed order must be submitted to a referendum of the producers supplying the marketing area specified in the order. In such referendum, the approval of a co-operative is considered to constitute the approval or disapproval of its members (7 U. S. C. 608c (9), B (i); (12); (19), *infra,* pp. 25–26, 26, 28). Second, the Secretary must make two findings: (a) that the failure of the necessary majority of the handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act; and (b) that the issuance of the Order is the only practical means of advancing the interest of the producers pursuant to the declared policy of the Act and that it has been approved by the required majority of such producers (7 U. S. C. 608c (9), *infra,* pp. 24–26).

2. THE ADMINISTRATIVE PROCEEDING IN THIS CASE

In the spring of 1955, extended hearings were held on a number of proposals to amend the orders regu-

lating the handling of milk in four Massachusetts marketing areas. The amendment here involved proposed that the Greater Boston Marketing Area covered by Milk Order No. 4 (7 CFR, Part 904, R. 703–746) [10] be expanded so as to include seven suburban communities which had become urbanized in varying degrees. On the basis of those hearings, the Deputy Administrator filed a "recommended decision" (R. 13–20) which proposed that four of those towns (*viz,* Framingham, Natick, Wayland, and Weston) be included in the Greater Boston Marketing Area. Exceptions filed against this recommended decision were overruled on September 13, 1955, by the Acting Secretary of Agriculture (R. 27–61), who concluded that the four towns should be included in the Greater Boston Marketing Area, and directed that a referendum be conducted among the producers of the Greater Boston Marketing Area, as then constituted, as well as in the four towns proposed to be added to it (R. 60–61).

According to the pertinent findings of the Secretary, the four towns had become a part of the Boston suburban area and were engaged in a process of rapid urbanization. Framingham and Natick, in particular, were "experiencing a very dynamic transition to an intensive residential and industrial area" (R. 29–30). Since local milk production in the area could supply only a small part of the total fluid milk supply of the area, local producers (including petitioners in the instant case) were able to sell all their milk as

[10] The basic parts of Milk Order No. 4 were discussed and held valid in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 593–594.

fluid milk, and local dealers obtained a large portion of their fluid milk requirements from unregulated sources (*i. e.*, New Hampshire and Vermont) and particularly from the Greater Boston Marketing Area (R. 32).

The Acting Secretary further found that (R. 32–33):

> All producers having a bona fide association with the fluid milk market should share equitably in the proceeds from sales in the market. The present pooling and pricing scheme under the Boston order will promote this principle.

and that (R. 60):

> The proposed marketing agreements and the orders, now in effect, and as hereby proposed to be amended, and all of the terms and conditions thereof will tend to effectuate the declared policy of the act.

As directed by the decision of the Acting Secretary (R. 60–61), the local marketing agent mailed out ballots on September 16, 1955, advising the recipient that if their votes were to be counted they would have to be received or postmarked not later than September 23, 1955 (R. 83, 77–79).

3. THE JUDICIAL PROCEEDINGS BELOW

(*a*) *In the District Court.*—On September 19, 1955, in the District Court for the District of Columbia, petitioners, alleging to be (or to act for) milk producers located in the four-town area, filed a complaint (R. 7–12) in which they attacked the Secretary's findings as arbitrary, capricious, and contrary to the evidence, and claimed that the submission of the refer-

endum to all the producers supplying the Greater Boston Marketing Area was improper. Petitioners set forth that the minimum prices they presently received were regulated by state law, and alleged upon information and belief that, if the Boston Order were extended to the four-town area, they would lose 50¢ on each hundred-weight of milk (which would constitute an average annual loss of $1,000 for each of the 97 producers located in the four-town area), because of the lower minimum price designated in the Boston Order. The complaint asked for permanent and interlocutory relief enjoining the completion of the referendum and for the judicial review of the administrative proceeding (R. 11–12).

A temporary restraining order granted at the time of the filing of the complaint, which enjoined respondent from conducting, consummating, or effectuating the referendum (R. 70–71), was vacated on September 21, 1955 (R. 73–74), on the basis of a stipulation pursuant to which respondent agreed not to issue the Order until after the argument and determination of petitioners' motion for a preliminary injunction (R. 73). A preliminary tabulation of the votes disclosed that the proposed Order was approved by a vote of 9,698 to 107. The vote of the producers covered in the original Greater Boston Marketing Area was 9,258 to 61; producers supplying the four-town area, but not Boston, favored it 440 to 46 (R. 83–84). In view of the completion of the referendum, petitioners amended their complaint asking for a preliminary injunction restraining respondent from amending the Boston Order so as to include the four towns in

the Greater Boston Marketing Area. The amended complaint also alleged that the Agricultural Marketing Agreement Act was unconstitutional (R. 81–82).

After a hearing, in which petitioners' counsel conceded that the findings of the proposed Order were sufficient (R. 177–178) but contended that they constituted "a tissue of falsehood" (R. 179), the District Court rejected petitioners' contentions regarding the constitutionality of the Agricultural Marketing Agreement Act. It recognized that this issue had long been settled by this Court in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533 (Pet. 44). The court, however, concluded that petitioners were entitled to a preliminary injunction.[11] However, neither the injunction order (Pet. 46), nor the memorandum opinion of October 6, 1955 (Pet. 41–45), nor the court's oral statement of October 21, 1955 (Pet. 47–49), contained any findings of the fact nor any specific conclusions of law which set forth the grounds for the court's action (Rule 52, Federal Rules of Civil Procedure).

(*b*) *In the Court of Appeals.*—The Court of Appeals, in its opinion of June 29, 1956, reversed the order of the District Court and remanded the case with instructions to dismiss the complaint (Pet. 49–56). It held that the injunction had to be dissolved because the complaint had been filed prematurely, *i. e.*, before an administrative order had been issued, and because

[11] In issuing the preliminary injunction, the District Court remarked that its action was based in part "[u]pon consideration of the record" (Pet. 45). However, the opinion makes clear that the reference could not have been to the administrative record, which had been brought before the court by counsel for the Secretary (Pet. 44).

the District Court had failed to make the required findings of fact and conclusions of law (Pet. 52).

The court, however, concluded that a remand to supply the required findings and conclusions, or a reversal on the ground that the complaint had been filed prematurely, would result in "[p]lain waste of time, effort and money plus possibly continued thwarting of the effectiveness of the legislative and administrative scheme" and decided to make a final determination of this litigation. It held that petitioners lacked standing to sue because the wrong of which they complained constituted merely an economic disadvantage, not the invasion of any legally protected rights. In this connection, the court determined that the two specific grounds on the basis of which petitioners attacked the proposed Order (*supra*, pp. 8–9) were untenable. It held that the selection of the producers authorized to vote in the referendum complied with the statutory requirements (Pet. 55), and that there was not any substance to petitioners' basic allegation that the Order was arbitrary, capricious, and unsupported by substantial evidence (Pet. 54).

A petition for rehearing in banc was denied without any noted dissent. Motions for a stay of the mandate were denied by the Court of Appeals and by Mr. Chief Justice Warren. The Secretary of Agriculture thereupon issued the Order on October 18, 1956, to be effective November 1, 1956 (21 F. R. 8131). In view of Section 4 (c) of the Administrative Procedure Act,[12] which requires that in the absence of good cause

[12] 60 Stat. 238, 5 U. S. C. 1003 (c).

found by the agency an interval of thirty days has to elapse between the publication of an order in the Federal Register [13] and its effective date, the Order recited that its issuance had been delayed by nearly a year as the result of the preliminary injunction obtained by petitioners and found specifically that (21 F. R. 8132):

> The delay in the issuance of this order has already seriously impaired the orderly marketing of milk in the marketing area, and any further delay beyond November 1, 1956, in making the order effective will substantially obstruct the effectuation of the declared policy of the act.

ARGUMENT

The history of this case, we submit, demonstrates that further review is not warranted. Moreover, as we shall show presently, the ruling below is in full accord with controlling precedent, and there is no merit to petitioners' attack on the Secretary's Order.

1. The court below properly held that petitioners, as milk producers, have no standing to seek review of the extension of the Greater Boston Marketing Area to the four towns. Petitioners are not suffering any legal wrong, nor are they adversely affected or aggrieved within the meaning of any relevant statute. Administrative Procedure Act, Section 10 (a).

(*a*) *Petitioners have not suffered any legal wrong.*— By its own terms, the statute has no application to petitioners in their capacities as producers; it applies

[13] The Order was published in the Federal Register of October 24, 1956.

only to handlers.[14] Petitioners themselves concede that the Order does not regulate them directly. They allege, however, that the Order prejudices them because the *minimum* price payable to them by the handlers under the federal Order is lower than the price they have been receiving under Massachusetts regulation. Yet, the Order does not prevent any handler from continuing to pay petitioners at the higher Massachusetts rate.[15] Conversely, if the Order were not extended to the four towns, petitioners still would have no assurance that they would remain covered by the state statute. Federal regulation would become applicable whenever a handler decides to sell petitioners' milk to areas under federal orders (*e. g.*, Boston and Worcester).

While it may be true that there is a possibility of economic disadvantage to petitioners, such disadvantage does not constitute a legal wrong. *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527 (C. A. D. C.); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884. As this Court pointed out in *Stark* v. *Wickard*, 321 U. S. 288, 304, 308–309, standing to attack a milk order requires more than the mere claim that the order is detrimental, or that the blended price is too low. It presupposes the actual invasion of a specific interest, personal to the plaintiff. There, the blended milk price

[14] *Supra*, pp. 5–6; cf. 7 U. S. C. 608c (13) (B), *infra*, pp. 26–27.
[15] *Stark* v. *Wickard*, 321 U. S. 288, 291; see also R. 359.

had been reduced by a misapplication of the funds actually belonging to producers. Here, petitioners merely allege that the Order would result in a decrease of their income.[16] They do not set forth any diversion of any funds properly belonging to them or any other invasion of a personal right.

(*b*) ***Petitioners are not adversely affected or aggrieved within the meaning of the Agricultural Marketing Agreement Act or any other statute.***—Although petitioners have not suffered any legal wrong, it might be argued that they are adversely affected or aggrieved by the Order in a general way. This, however, by itself is not enough to confer upon them a standing to sue. Section 10 (a) of the Administrative Procedure Act does not open the door to judicial review to everyone adversely affected or aggrieved by agency action but only to those who are "adversely affected or

[16] There is no merit to petitioners' statement that the District Court made a finding to the effect that the Order would not only cause a loss of income to petitioners but would force them completely out of business. As a matter of fact, the District Court did not make any formal findings of fact and conclusions of law (*supra*, p. 10). And the written memorandum opinion of October 7, 1955 (Pet. App. 41–45), is silent on the issue. The court's remarks upon which petitioners rely are to be found in an oral informal statement of the court (Pet. 47–49, R. 288–290). The alleged "finding" is based exclusively upon unsupported assertions of petitioners' counsel during the argument concerning the practicability of an escrow arrangement (R. 257–259). It finds no support in the pleadings (the complaint merely alleges an average annual loss of $1,000), nor in the affidavits submitted by petitioners (R. 88–95; but cf. R. 94–95). Indeed, petitioners' counsel conceded that there was no pertinent evidence on the point in the record and merely "suggested" that the escrow arrangement might "drive some, if not many, of these people out of business" (R. 259).

aggrieved by such action *within the meaning of any relevant statute.*" The italicized words are crucial and, of course, cannot be deleted. See, *e. g., Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934 (C. A. D. C.), certiorari denied, 350 U. S. 884.

The question whether or not a person is adversely affected within the meaning of a statute depends on the general statutory plan. In many instances, it may be inferred from its review provisions. Thus a person who may seek review is generally considered aggrieved or affected within the meaning of the statute. It is significant that all the decisions cited by petitioners in this connection (Pet. 11) arose under the Federal Communications Act, the Federal Food, Drug, and Cosmetics Act, the Hatch Act, and the Bituminous Coal Act, all of which permit review by parties "aggrieved" or "adversely affected". In the absence of a special statutory provision authorizing judicial review, however, a person who is merely economically affected by agency action has no standing to challenge the latter. *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 934 (C. A. D. C.), certiorari denied, 350 U. S. 884; *United Milk Producers of New Jersey* v. *Benson,* 225 F. 2d 527, 529 (C. A. D. C.); *Associated Industries* v. *Ickes,* 134 F. 2d 694, 702 (C. A. 2), vacated as moot, 320 U. S. 707.

The review provisions of the Agricultural Marketing Agreement Act (7 U. S. C. 608c (15), *infra,* pp. 27–28) are in terms limited to handlers; they do not authorize review by any interested or aggrieved person. Nor does *Stark* v. *Wickard,* 321 U. S. 288, hold that a mere financial disadvantage gives a producer stand-

ing to seek review of a milk order. To the contrary, that decision was based on the express finding that a specific legal right of the plaintiff had been invaded (321 U. S. at 305, 308–309). The Court clearly pointed out that, absent such personal right, the alleged detrimental effect of the agency action would be merely *damum absque injuria* (321 U. S. at 304). Moreover, 7 U. S. C. 608c (3) (*infra*, pp. 26–27), which states expressly that the milk orders under the Act are not applicable to producers, negatives any notion that, pursuant to the general statutory plan, producers should be considered as persons adversely affected or aggrieved by such orders.

2. In any event, we submit that in this case the question of standing is purely hypothetical. Petitioners plainly cannot succeed on the merits.

The complaint challenges the Secretary's Order on two grounds. It claims, first, that the findings are arbitrary, capricious, and not supported by the evidence, and second, that the Secretary should not have submitted the referendum to all the producers supplying the marketing area but only to those who supplied the four towns. The court below properly held that both of these challenges to the validity of the Order are without substance.

(*a*) The Order is based upon a valid statute. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Stark* v. *Wickard*, 321 U. S. 288, 310. Accordingly, it carries with it the presumption of the existence of facts justifying the exercise of the administrative action. *Pacific States Co.* v. *White*, 296 U. S. 176,

186; *United States* v. *Rock Royal Co-op.*, 307 U. S. 533, 567–568.

Moreover, a party who seeks to challenge the validity of a statute or regulation must allege specific facts. *E. g., Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 169–170; *Pacific States Co.* v. *White*, 296 U. S. 176, 184–186; *Dyer* v. *Gallagher*, 203 F. 2d 477, 479 (C. A. 6). The allegations of the complaint that the findings "were invalid as a matter of law as being contrary to the evidence * * * that no reasonable man could make on the evidence and were arbitrary and capricious" are at best "legal conclusions" or "epithets" (*Silberschein* v. *United States*, 266 U. S. 221; *Adams* v. *Nagle*, 303 U. S. 532, 542); they are insufficient to state a claim upon which relief can be granted (*Dyer* v. *Gallagher, supra*).

The evidence in the record—indeed, the very testimony introduced by petitioners themselves—fully supports the Secretary's findings. The affidavits submitted by petitioners in support of their motion for a preliminary injunction establish that they sell on the average all but three per cent of their milk as fluid milk.[17] Inasmuch as the industry must carry on the average a daily surplus burden of 15%–20%,[18] the record shows that petitioners do not bear their full share of the common burden of the surplus milk and that the Secretary's Order carried out the very purpose of the statute.

[17] Sparrow Affidavit, R. 86; Schofield Affidavit, R. 88, 89.

[18] *Nebbia* v. *New York*, 291 U. S. 502, 517. See also *Study of the Dairy Industry*, Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Sess., p. 183.

Similarly, the evidence introduced at the administrative hearing by those who opposed the extension of the Greater Boston Marketing Area to the four towns—including the testimony of the petitioner Schofield (R. 509–531)—established that the milk producers in the four-town area were able to sell all or almost all of their milk at fluid milk prices.[19] The reason for this as explained by petitioners' own witnesses was that the local producers were not able to supply the needs of the four-town area,[20] that considerable quantities of fluid milk and cream had to be imported from the Boston milk pool and out-of-state sources in order to compensate for the local milk deficit,[21] and that local handlers as a rule favored local producers by buying their entire fluid milk output and by obtaining the variable surplus demands from the outside.[22]

Thus petitioners' evidence alone justified the findings (*supra,* pp. 8–9) that, as a result of the local milk deficit and the preferential treatment they received from local dealers, local producers were able to sell all their milk at fluid milk prices and that all producers supplying the market should, in equity, share in the profits of the fluid milk sales and in the burden of the surplus milk.

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[19] R. 355, 488, 498, 552, 569, 580, 629, 631, 637, 642.

[20] R. 498.

[21] R. 488, 493–494, 498–504, 521–522 (testimony of the petitioner Schofield), 563–564, 580, 636.

[22] R. 498, 552, 580. Significantly, local handlers purchased from the Boston pool almost their entire cream supply for which producers do not get fluid milk prices. 7 CFR 904.15, 7 CFR 904.4 (a), (b); R. 710–713, R. 554, 580, 636.

The absence in the Order of any specific quantitative data concerning the amount and sources of the milk imported into the four-town area, of which petitioners complain (Pet. 6–7), was caused by the refusal of the Massachusetts Milk Commission and of the largest handler of the region to disclose those figures (R. 456, 469, 479). In those circumstances, the Secretary was obliged to rely on circumstantial evidence and his administrative experience. This Court has indicated that it will not review the exercise of administrative discretion in this area. *Stark* v. *Wickard,* 321 U. S. 288, 310. In any event, the administrative action is presumptively valid (*United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 567–568), and petitioners have not set forth any facts to rebut that presumption.

Nor is there any merit to petitioners' argument (Pet. 12) that the Order is invalid because the Secretary found generally that the proposed Order would tend to effectuate the declared policy of the Act (R. 60) and did not make any detailed specific findings reciting each of the purposes of the Act. The complaint does not contain any allegations to that effect. Moreover, the Order itself (as finally issued) states that (21 F. R. 8132):

> The delay in the issuance of this order has already seriously impaired the orderly marketing of milk in the marketing area. * * *

(*b*) Petitioners' second argument in the complaint against the validity of the Order was the contention that the referendum should not have been submitted to all the producers supplying the Greater Boston Marketing Area as enlarged by the Order, but only to

the producers supplying the four towns. Petitioners have not specified this issue in the questions presented; accordingly, we assume that they have abandoned this issue. In any event, the court below properly held that no basis can be found in the statute for petitioners' argument and that the determination of the producers authorized to participate in the referendum conformed with the ruling of this Court in *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 597–599. Moreover, if any error was committed on this score, it was not prejudicial. Even if the voting had been limited to those supplying only the four towns, the Order would have been approved by a vote of 440 to 46 (R. 84). Petitioners' basic attack seems to be directed at the fact that co-operatives voted for their members. This, however, is required by the statute (*supra,* p. 6), and the pertinent provisions have been held constitutional by this Court. *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 559–560; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 599.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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December, 1956.

APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U. S. C. 601ff, provides in pertinent part:[1]

SEC. 601. DECLARATION OF CONDITIONS.

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

SEC. 602. DECLARATION OF POLICY; ESTABLISHMENT OF BASE PERIODS FOR PRICES; MARKETING STANDARDS.

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608, 608a, 608b, 608c, 608d–612, 613–619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to es-

[1] In view of the many amendments to the Agricultural Marketing Agreement Act, which itself constitutes a reenactment of and amendment to the Agricultural Adjustment Act as amended (see *supra*, p. 6), we reproduce the statute as it now appears in Title 7 of the United States Code.

tablish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608, 608a, 608b, 608c, 608d–612, 613–619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c (2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c (2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

* * * *

SEC. 608c. ORDERS REGULATING HANDLI
COMMODITY—

(1) Issuance by Secretary.

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from

time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

* * * * *

(3) Notice and hearing.

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order.

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613–619, 620, 623, and 624 of this title with respect to such commodity.

(5) Milk and its products; terms and conditions of orders.

In the case of milk and its products, orders issued pursuant to this section shall contain one

or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

* * * * *

(8) Orders with marketing agreement.

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order.
* * *

(9) Orders with or without marketing agreement.

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers

(excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or

favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * * * *

(12) Approval of cooperative association as approval of producers.

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the aproval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption.

(A) No order issued under subsection (9) of this section shall be applicable to any person

who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, 624 of this title shall be applicable to any producer in his capacity as a producer.

* * * * *

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary.

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States [including the district court of the United States for the District of Columbia] in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance

with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection shall not impede, hinder or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a (6) of the title. Any proceedings brought pursuant to section 608a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection.

* * * * *

(19) Producer referendum for approving order.

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

* * * * *

SEC. 610. ADMINISTRATION—

(a) Appointment of officers and employees; exemption from civil service regulations; salaries; impounding appropriations.

* * * * *

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency.

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of said sections, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

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U. S. GOVERNMENT PRINTING OFFICE: 1999